

**True Drilling Company and Don G. Reichert. Case
27-CA-6772**

July 30, 1981

DECISION AND ORDER

On January 28, 1981, Administrative Law Judge Jerrold H. Shapiro issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief to the General Counsel's exceptions.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in this case was held on October 30, 1980, and is based on an unfair labor practice charge filed by Don G. Reichert on June 20, 1980. A complaint issued August 8, 1980, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 27, alleging that True Drilling Company, herein called Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the National Labor Relations Act, herein called the Act, by terminating the employment of Don G. Reichert and Jeffrey Terry on or about February 23, 1980, because they engaged in protected concerted activity to protest unsafe working conditions. Respondent filed an answer to the complaint, which denies the commission of the alleged unfair labor practices.¹

Upon the entire record, and having considered the post-hearing briefs submitted by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

A. The Evidence

Respondent owns oil drilling rigs, which it operates in the several western States of the United States. Its headquarters is located in Casper, Wyoming.

¹ In its answer Respondent admits that it is an employer engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act and meets the Board's jurisdictional standard.

In operating an oil drilling rig, Respondent employs a tool pusher who has overall supervisory responsibility for the rig's operation, 24 hours a day, 7 days a week. He lives at the site of the rig. The tool pusher hires three drillers who work the 24-hour schedule necessary to keep the rig operating properly. Each driller is responsible for hiring a crew of four persons—a derrick man, a motor man, and two floor hands—who work under the driller's immediate supervision. The drillers and their crews work staggered shifts in order to keep the rig operating 24 hours a day.

The rig is a steel structure approximately 100 feet high, comparable to a derrick. There is a platform attached to its base on which the work crews spend a substantial portion of their worktime. The derrick man also spends a part of his worktime working about 80 feet above the platform on a board 2 feet wide and 8 feet long. There is a sheltered area on the ground adjacent to the platform which is called a doghouse and is used by the crews to change into their work clothes. There is another similar sheltered area on the platform used by the crews during working hours, when not working, to protect themselves from the weather.

The instant dispute arose from an incident which took place on February 23, 1980,² at Respondent's rig number 17 which was located at McFadden, Wyoming. E. W. Wattenberg was responsible for the operation of the rig. On or about 11 p.m., February 23, the work crew supervised by driller Bill Britton was scheduled to be relieved by a crew supervised by driller David Baxter. At the time, Britton's crew was engaged in the process of "tripping out of the hole"; namely, pulling the drill stem out of the hole in order to replace a drill bit. At approximately 10:30 p.m., the derrick man who was scheduled to work on Baxter's crew, Marcial Calderon, arrived with an unidentified person who came with Calderon to substitute for Calderon's brother who was scheduled to work with Baxter's crew, but was absent. It was shortly after 11 p.m. when Baxter arrived accompanied by the two other members of his crew, Don Reichert and Jeffrey Terry. Reichert and Terry were relatively new workers with either little or no prior experience. Reichert had been working at rig 17 for only about 1 month and had no prior experience in this line of work. Terry had been working at rig 17 for about 2 weeks with only 3 or 4 months prior experience working on other rigs.

The witnesses who testified about the events of February 23 were Reichert and Terry for the General Counsel, and Britton and Wattenberg for Respondent. A summary of their testimony follows.

Reichert testified that when he arrived at the rig on February 23 he overheard Baxter tell Calderon that Baxter would not allow Calderon to work that night because he was drunk and that Calderon was fired because this was not the first time Baxter had warned him about being drunk on the job. Baxter then unsuccessfully tried to get a replacement for Calderon. Shortly thereafter, Wattenberg, who lived at the site of the rig in a house-trailer, told Baxter that Baxter would have to work Cal-

² Unless otherwise specified, all dates herein refer to 1980.

deron because Calderon was "the best man we've got." Baxter answered, "No, you'll work him" and took off his coveralls. Reichert further testified that at this point in time Reichert spoke up and told Baxter, "I am with you, I am not going to work under the drunken bastard." Wattenberg asked Terry how he felt about the matter. Terry told Wattenberg, "I'm with them." Baxter, Reichert, and Terry removed their clothing and other personal belongings from their lockers and left the rig.³ On the subject of Calderon's state of intoxication, Reichert testified that he thought Calderon was drunk because "he was talking very loud, his eyes appeared to be very, very bright, he had difficulty maintaining stability, he was rocking back and forth and on occasion I saw him back against the wall and he hit the wall to catch his balance."

Terry testified that after Baxter indicated he did not intend to work if Wattenberg did not permit him to discharge Calderon Wattenberg asked Terry what Terry intended to do. Terry answered that he was "going to town with [Baxter]" and left the rig with Baxter and Reichert. Terry testified that he left because he felt it would be unsafe to work with Calderon who, in Terry's opinion, was drunk. Terry testified that he believed Calderon was intoxicated because Calderon who normally never talked very much was talking quite a bit; that Calderon's eyes were glassy and a little bloodshot; and that Calderon kept repeating that he was "happy."

Britton testified that Baxter informed him he was not going to work Calderon because he was drunk. Baxter also told Britton that he did not know what he was going to do because he did not have a derrick hand and asked if there was anyone on Britton's crew who would stay and work on Baxter's crew that night as the derrick hand.⁴ When Baxter failed to find a replacement for Calderon, Britton testified that he offered to do Calderon's job and that Baxter accepted his offer.⁵ At this point, Wattenberg entered the doghouse and told Baxter to work Calderon because Calderon was the most experienced employee on Baxter's crew.⁶ Wattenberg stated that if Baxter wanted to fire Calderon to do it some other time. Baxter replied that he had the right to hire and fire whomever he wanted on his crew and if he could not do that he was going to quit; he walked over to his locker and packed up his clothing. Wattenberg asked Terry if he was going to stay. Terry replied that he did not know. Baxter asked whether Terry and Reichert were going to remain. Terry and Reichert stated they would leave with Baxter, and the three of them left the rig. Regarding Calderon's state of intoxication, Britton testified that Calderon did not appear drunk but only

looked tired from a lack of sleep and that there was nothing in his speech or motions which indicated he was drunk, and that in fact Calderon worked for Britton later that night and did not appear to be drunk.

Wattenberg testified that Britton woke him up February 23 and advised him that there was a problem at the rig, and that shortly thereafter Calderon came to his trailer and asked for a termination slip, explaining that Baxter had discharged him for supposedly being intoxicated. In Wattenberg's eyes, Calderon did not look as if he was intoxicated but just looked tired. Wattenberg went to the rig and told Baxter that he would have to work Calderon for that shift. Baxter replied that he would not work someone that was drunk. Wattenberg told Baxter that he did not think Calderon was "that bad," whereupon Baxter took the position that he would hire and fire whomever he desired. Wattenberg told Baxter that Baxter had no choice but to employ Calderon for that night because Calderon was needed to keep the rig operating, but if Baxter wanted to replace Calderon the next day that Wattenberg had no objections. Baxter stated he would not comply with Wattenberg's instruction and went to his locker and removed his personal belongings. Wattenberg asked Reichert and Terry if they intended to stay or to quit like Baxter. They indicated they would leave with Baxter and, in fact, did so.

Britton and certain members of Britton's crew stayed and worked the shift that Baxter's crew, on February 23, had been scheduled to work. The next morning it is undisputed that Wattenberg, who was under the impression that Baxter, Terry, and Reichert had quit their employment, made arrangements for the employment of another crew to replace Baxter's. Wattenberg contacted another driller whom he hired to replace Baxter. On Monday, February 25, at 7 a.m., when Baxter and his crew were next scheduled to work, the new driller and his crew began work at rig 17 in place of Baxter's crew.⁷ Baxter's crew, on February 25, did not show up for work.

On Monday, February 25, at approximately 11 a.m., Baxter, Reichert, and Terry spoke to Respondent's assistant drilling superintendent, Earl Sides, at Respondent's headquarters in Casper, Wyoming. They spoke to him a second time that afternoon. Reichert and Terry testified about these conversations for the General Counsel whereas Sides testified on behalf of Respondent.

B. Testimony

Reichert testified that Baxter acted as the spokesperson for the group and told Sides that they wanted their jobs back, but that if they could not have their jobs back they wanted their bottom hole pay.⁸ Sides told them that it was up to the tool pusher to hire the drillers and that it was up to the drillers to hire their own crews, and that Baxter would have to speak to Wattenberg about getting

³ The record establishes that it is understood in the drilling industry that when a worker, besides leaving a rig, removes his clothing and other belongings from his locker it indicates that the worker has quit the job.

⁴ It is undisputed that it was not unusual for a worker on one crew to stay over and work the next shift on another crew to fill a vacancy.

⁵ Britton testified that, when he offered to take Calderon's place, Terry and Reichert were within 2 feet from where he was talking with Baxter. Terry and Reichert testified that they did not remember any such discussion between Britton and Baxter.

⁶ Britton testified that he did not have a chance to tell Wattenberg that he would take Calderon's place and did not hear Baxter communicate this information to Wattenberg.

⁷ The record establishes that it is Respondent's practice to hire a driller, who in turn is responsible for hiring the members of his crew.

⁸ Bottom hole pay is incentive pay which Respondent pays its workers to stay until a hole is completed. The pay is equal to 15 percent of the total pay of an individual worker earned while working on a particular hole. It is undisputed that bottom hole pay is not paid before a well is completed.

his job back and that as far as the bottom hole pay was concerned they were not eligible for that because the job on which they were working was not finished. Reichert spoke up and stated that they had intended to stay through to the completion of the hole but Wattenberg had forced them to choose between their jobs and their safety. Sides stated that if they failed to get their jobs back that he would give them their paychecks for the time they had worked and if they did succeed in getting back to work they would receive bottom hole pay if they remained until the job was finished. At this point, Baxter apparently tried to contact Wattenberg by phone to determine their employment status, but was unable to reach him. Sides told them to return later in the day for their paychecks. When they returned for their checks, Sides asked them to sign a so-called pink slip, entitled "termination date," dated February 25, and which, in the portion captioned "reason for termination" was marked "quit?" Reichert refused to sign the slip. He stated that he was not quitting, but was trying to get his job back. Sides stated that the purpose of the slip was to provide the Company with a receipt showing that it had paid the employees the moneys it owed them. Reichert asked whether he could sign the back of the slip. Sides agreed. Reichert wrote on the back of the slip that he had received his paycheck dated February 25 for the money owed him. He signed his name next to this statement. Reichert told Sides that he felt they had been treated unfairly by the Company and had the right to receive bottom hole pay because they had intended to stay until the end of the job, but rather than work with Calderon under unsafe conditions had chosen their own safety. Sides told them that they would have to speak to Wattenberg about their jobs. Reichert replied that, if he did not get his bottom hole pay and if, when he got back to the rig, he discovered another crew had been hired to replace them, he intended to prosecute Respondent. The next day Reichert phoned the rig and was informed by an unidentified person that there was another crew working in place of Baxter's.

Terry's recollection of what took place in Sides' office on February 25 was sketchy. He testified that Baxter and Reichert did most of the talking and further testified, "I can remember asking for our checks, asking about getting our jobs back and asking about bottom hole [pay]," and testified that Sides told them, "We'd have to come back and get our checks in the afternoon and that he doubted if we could get our bottom hole [pay]," and if they wanted to return to work for the Company they would have to contact Wattenberg. Later that day Terry testified that he returned to pick up his check and signed a slip which stated he had "quit?" Terry crossed this out and instead wrote that he "did not want to work for a drunk." Later that week Terry drove out to the rig and observed there was a new crew working there which had replaced Baxter's crew. Terry asked the driller whether he was short handed. The driller told him no.

Sides testified that when Baxter, Reichert, and Terry entered his office on February 25, they initially asked for their paychecks and that in response to Sides' inquiry they told him they had quit their job due to a safety problem and explained to Sides that they thought Cal-

deron had been intoxicated Saturday evening. With regard to their paychecks, Sides testified that they asked for their bottom hole pay and that, when Sides told them they were not eligible for such pay unless they worked to the completion of the hole, for the first time they asked about getting their jobs back, at which time Sides told them that they would have to go back to the rig and determine whether the driller who had taken Baxter's place needed any roughnecks for his crew. Later that day when Baxter, Terry, and Reichert returned for their paychecks, Sides testified that he asked them to sign the above-described "pink slips," which had been made out by personnel so that Respondent would have a receipt for the moneys they had paid to the employees.

C. Conclusionary Findings

The General Counsel contends that Reichert's and Terry's refusal to work with Calderon on February 23 constitutes protected concerted activity within the meaning of Section 7 of the Act. Respondent takes the position that, assuming, *arguendo*, the conduct of Reichert and Terry constitutes protected concerted activity Respondent did not violate the Act inasmuch as Respondent permanently replaced them with other workers, as was its right under the Act, rather than discharge them. I agree with Respondent's position. Thus, I have not resolved the several conflicts in the evidence set forth above and have not resolved the question of whether the conduct of Reichert and Terry herein was protected by Section 7 of the Act.

As described in detail, *supra*, the record as a whole, when construed most favorable to the General Counsel, contains no evidence that Respondent discharged Reichert or Terry. Indeed, they testified in effect that they were not notified by anyone from management that they had been terminated.⁹ Quite the contrary, when Reichert and Terry, on February 23, refused to work with Calderon and left the job, they cleaned out their lockers which was the type of conduct calculated to lead Respondent to believe that they had voluntarily terminated their employment. And, it is undisputed that following Reichert's and Terry's February 23 refusal to work with Calderon, on February 25, before they had indicated to Respondent their desire to return to work, Respondent had permanently replaced them with other workers because of a legitimate business purpose. Under these circumstances Respondent, on February 25, was not legally obligated to reinstate Reichert or Terry because even though Respondent, as a matter of law, had no right to discharge or otherwise punish them for refusing to work with Calderon if their conduct was protected concerted activity, Respondent did have a legitimate interest in continuing to operate rig 17 and, thus, was legally au-

⁹ The "pink slips" given Reichert and Terry to sign on February 25 fail to establish that they were terminated by Respondent. They were asked to sign these slips so as to provide documentation for Respondent that they had received the money owed them by Respondent. Moreover, the slips, on their face, indicate that Respondent did not terminate Reichert or Terry but give the impression that they had voluntarily quit their employment on February 23 when they cleaned out their lockers and walked off the job.

thorized to permanently replace Reichert and Terry with other workers. *N.L.R.B. v. MacKay Radio & Telegraph Co.*, 304 U.S. 333, 345-346 (1938); *N.L.R.B. v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 379 (1967). The fact that Reichert and Terry may have believed, in good faith, that Calderon was intoxicated and thus was a danger to their safety if they worked with him did not circumscribe Respondent's right to permanently replace them as striking employees. I recognize that Section 502 of the Act, among other things, states that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act." In construing Section 502, the Board, with the approval of the Supreme Court, applies "an objective, as opposed to a subjective test. What controls is not the state of mind of the employee . . . concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'" *Redwing Carriers, Inc. and Rockana Carriers, Inc.*, 130 NLRB 1208, 1209 (1960); *Gateway Coal Co. v. United Mine Workers of America, et al.*, 414 U.S. 368, 385-387 (1974). Thus, without deciding whether Section 502 is only applicable in the context of a contractual no-strike clause as urged by Respondent,¹⁰ I am of the view that the conditions complained of herein, while having an element of remote risk to the employees, could not be considered "abnormally dangerous" within the meaning of Section 502. The sole evidence presented by the General Counsel to establish why the employees felt unsafe working with Calderon was Terry's testimony that he thought that, due to Calderon's

apparent intoxication, Calderon might fall from the board down onto the workers on the platform or that Calderon's hardhat might likewise have fallen. On cross-examination Terry admitted, and it is undisputed, that Calderon did not wear a hardhat and that when Calderon worked on the board above the platform that he was always strapped to his position, thus he could not have fallen. In addition, the record establishes that Calderon spent only a small part of his working time at work on the board above the platform. In my opinion, considering the aforesaid circumstances, the evidence presented by the General Counsel that it would have been dangerous for Reichert and Terry to have worked with Calderon if he was intoxicated was not the kind of objective evidence to support an employee's conclusion that an abnormally dangerous condition for work existed.

Based upon the foregoing, I shall recommend that the complaint in this case be dismissed in its entirety.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹¹

The complaint is dismissed in its entirety.

¹⁰ Here there is no claim that the employees' conduct violated a contractual no-strike pledge.

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.